Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition	)	
Provisions of the Telecommunications	)	CC Docket No. 96-98
Act of 1996	)	

BELLSOUTH REPLY COMMENTS

BellSouth Corporation, on behalf of itself and its wholly owned subsidiaries, hereby submits its Reply Comments in the above referenced proceeding.

I. Introduction

Nothing in the comments support the Commission granting NuVox's Petition for Declaratory Ruling ("Petition"), which seeks to severely limit an incumbent local exchange carrier's ("ILEC") right to audit competitive local exchange carriers' ("CLEC") substitution of special access circuits with combinations of unbundled network element ("UNE") loops and transport, otherwise referred to as enhanced extended links ("EEL"). As BellSouth articulated in its Opposition to the Petition, the requirements necessary for an ILEC to conduct such an audit are clearly set forth in the *Supplemental Order Clarification.*[1] The Petition, and comments filed in support of the Petition, attempt to transform these requirements into CLEC veto powers that in turn render the audit rights of the ILECs impotent. These requirements, however, are not some malleable framework that can be twisted to suit the CLECs' desires.

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[1] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *Supplemental Order Clarification,* 15 FCC Rcd 9587 (2000).

The Commission's *Supplemental Order Clarification* was clear on its intent to allow ILECs the right to audit EELs to ensure they comply with the use restrictions placed on them. This right was not limited to only when the CLEC approves. Nor did the *Supplemental Order Clarification* grant the CLEC veto power over the auditor selected to conduct the audit based on unsubstantiated claims of bias. NuVox, and those in support of the Petition, offer nothing more than self-serving assertions to support what they claim the requirements mean as opposed to what they clearly state. The Commission should deny NuVox's Petition.

A. CLECs Do Not, and Should Not, Have the Ability to Reject an Audit Simply Because They Do Not Deem the Reason for the Audit to Be Legitimate

In its Reply, NuVox attempts to brush off its request to be the arbiter of whether an ILEC may audit a CLEC. It attempts to suggest that the Commission always intended for the ILEC to submit its concerns to the CLEC and if the CLEC found them to be "bona fide" and "legitimately" related to the CLEC's non-compliance, then the CLEC would grant the ILEC permission to audit. This form of reasoning defies logic. Under these circumstances the CLEC can freely convert or establish EELs, no matter what manner of traffic traverses over them, with impunity.[2] That is, they could self-certify "that they are providing a significant amount of local exchange service over combinations of unbundled network elements"[3] but when an ILEC requested an audit, no matter what concern was given for the request, the CLEC could merely assert that the reason was not legitimate. Indeed, under this reasoning, if the CLEC agreed to the

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[2] Without the ability to audit, CLECs have no incentive to provide proper certification in the first place. The cost for the audit and the nonrecurring charges serve as the only deterrents to CLECs to converting all their special access circuits. Without those deterrents, a CLEC bears absolutely no risk in switching to a cost-based EEL and has every incentive to provide false certification. If a circuit is found to be non-compliant, then the CLEC would convert it back and lose nothing but would have gained the use of the circuit and interest on the difference between the special access and UNE rates for however long it had been improperly billed for a UNE.

[3] *Supplemental Order Clarification* at 9602, ¶ 29.

audit, it would be a tacit admission of some improper action on the part of the CLEC. Simply put, a clear statement in the *Supplemental Order Clarification* that ILECs "may conduct limited audits only to the extent reasonably necessary to determine a [CLEC's] compliance with the local usage options"[4] along with the agreement that such audits "will only be undertaken when the incumbent LEC has a concern that a [CLEC] has not met the criteria for providing a significant amount of local exchange service"[5] cannot not be transformed into a CLEC's ability to veto the audit if the CLEC does not unilaterally find the ILEC's concern to be legitimate.

Even if the Commission granted CLECs veto power over EEL audits, it must find that BellSouth's concerns in requesting the audits are legitimate. NuVox and the Joint Commenters[6] state, without support, that "BellSouth management informed one of the Joint Commenters that it intended to audit every CLEC that converted special access circuits to EELs."[7] This is not BellSouth policy and BellSouth cannot verify that any such statement was made without having more details. BellSouth's practice, as it has explained on more than one occasion to the Commission's staff and to inquiring CLECs, is to routinely check a pre-determined list of triggers for all the CLECs who purchase combinations of loops and transport. BellSouth will seek to audit any and all carriers for whom a concern is generated by this list of triggers.[8] The Joint Commenters imply that BellSouth invented this process after the fact because it chose not

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4 *Id.* at 9603, ¶ 29.

5 *Id.*, n.86.

6 Joint Comments of Cbeyond Communications, LLC; ITC^DeltaCom Communications, Inc.; KMC Telecom Holdings, Inc.; NewSouth Communications Corp., and XO Communications ("Joint Comments").

7 *Id.* at 3.

8 BellSouth determines the priority, and in some cases, the timing of the audits based on business risk or other factors. For instance, BellSouth likely will not commence auditing a carrier who is currently in bankruptcy proceedings or who only has one EEL in service.

to share its process with the CLECs prior to commencing audits. This is simply not true. The process was developed in January and February.[9] BellSouth, pursuant to its right to do so, chose not to reveal the specifics of the items it monitors to mitigate the gaming that could occur if the process were generally known.

The Joint Commenters assert that BellSouth has "virtually ceased issuing new EEL audit requests"[10] since the Petition was filed. The fact is that no additional carriers have triggered the need to do so recently.

B. A CLEC Cannot Veto the Selection of an Auditor Based on Naked Allegations that the Auditor Lacks Independence

NuVox, as well as other commenters, continues to berate BellSouth's selection of an auditor. NuVox argues, with no facts other than a claim of alleged bias because the auditors once worked for a LEC, that the auditors are not independent. NuVox states "[a]lthough BellSouth recognizes its obligation to hire an independent auditor to conduct the audit, BellSouth insists that its assertion of independence should be enough."[11] The facts do not support this claim.

BellSouth has not simply asserted that the auditor it selected is independent, but provided NuVox with extensive background information on the firm and its principals. This information established the experience levels and history of the principals in conducting these types of audits. Nothing in the information suggests that the auditors are not independent, in fact or appearance. Instead, it is NuVox that simply asserts that because the firm's "principals have spent significant

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[9] The process has gone through multiple refinements to more accurately reflect any concerns, but has essentially remain unchanged.

[10] Joint Comments at 3.

[11] NuVox Reply at 7.

parts (if not all) of their carriers [sic] in the employ of ILECs"[12] then it cannot be independent. This fact, whether true or not, does not mean that the principals are not capable of exercising objective and impartial judgment on all issues encompassed within the proposed engagement. Indeed, they do not, nor does NuVox even allege them to, have a mutual or conflicting interest with BellSouth. They will not be auditing their own work. They will not be acting as management or an employee for BellSouth. Nor will they be placed in the position of being an advocate of BellSouth. The audit in question is not subjective. The EEL either meets the criteria specified or it does not. The auditor will simply report its findings to BellSouth. Payment is based on hours worked and not on any results. These facts fully support the auditors' independence. They are not mere assertions as alleged by NuVox.

NuVox would have the Commission allow a CLEC to veto an auditor based on naked assertions of bias. Allowing CLECs the ability to prevent an audit just by objecting to the auditor would simply be used as a stall tactic by CLECs with every audit request. Indeed, that is exactly what NuVox is doing in this case. It has produced nothing, other than its allegations of bias, to suggest the auditors selected by BellSouth are not independent. It is amazing that NuVox accuses BellSouth of offering mere assertions that the auditors are independent when in fact BellSouth has produced empirical evidence in the face of nothing more than naked allegations by NuVox. NuVox's claim has no merit.

C. BellSouth's Audit Rights Extend to All Purchases of UNE Loops and Transport Combinations and Is Not Limited to Combinations Converted From Special Access

The Joint Commenters raised a matter that is beyond the scope of this proceeding but merits some clarification. They assert that in some of its audit notices to CLECs, BellSouth is

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12 *Id.* at 7-8.

attempting reach beyond the scope of circuits available for audit and include UNE loops and combinations that were ordered as new circuits. The Joint Commenters allege that ILECs are limited to only auditing EELs converted from special access services.

As to UNE loops, the Joint Commenters state that BellSouth is attempting to impose use restrictions on these loops. This is not the case. BellSouth has agreements with several carriers, which allow, and in some cases require, audits of some standalone UNE circuits for compliance with the terms of those agreements. BellSouth has notified some carriers of its intent to include those circuits in the audit of the EELs for the sake of expediency. BellSouth is in no way attempting to impose restrictions on UNE loops in general.

Regarding combinations that were ordered as new circuits, the same use restrictions apply to them as to circuits converted from special access. BellSouth is well within its rights under the *Supplemental Order Clarification* and the terms of the various interconnection agreements to audit these circuits. In establishing the safe harbor rules, the Commission was concerned that "permitting the use of combinations of unbundled network elements in lieu of special access services could cause substantial market dislocations."[13] The Commission stated that it defined the safe harbors so that, "until [it resolves] the issues in the *Fourth FNPRM*, IXCs may not substitute an incumbent LEC's unbundled loop-transport combinations for special access services unless they provide a significant amount of local exchange service, in addition to

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13 *Supplemental Order Clarification,* 15 FCC Rcd at 9592, ¶ 7.

exchange access service, to a particular customer."[14] A UNE combination can be used to substitute for special access services whether it is ordered as new or is converted.[15]

The Joint Commenters contend that the Commission did not specifically "extend its. . . 'constraint' to new EELs which it refused to make available in its *UNE Remand Order*."[16] However, since at the time the *Supplemental Order Clarification* was issued the Commission had not made new EELs available on a general basis, then the Commission can hardly have been expected to have specifically stated that the use restrictions extended to them. The policy issues that led the Commission to issue the usage restrictions for conversions apply equally to combinations that are ordered new. There is no reason the Commission's concerns would be limited to conversion situations when a new combination clearly can be used the same way.

Moreover, many of BellSouth's interconnection agreements recognize, implicitly or explicitly, that the safe harbor rules apply to new EELs. For example, MCI's interconnection agreement states that "BellSouth shall offer access to loop and transport combinations, also known as the Enhanced Extended Link ("EEL"). . . provided that the entire circuit meets the criteria [the safe harbor rules] described in subsections 5.4.1.1 through 5.4.1.3 below."[17] Additionally, the NewSouth interconnection agreement states,

> Subject to Section 4.2.3 below, BellSouth will provide access to the EEL in the combinations set forth in 4.3 following.... *Except as provided for in paragraph 22 of the FCC's Supplemental Order Clarification, released June 2, 2000, in CC Docket No. 96-98 ("June 2, 2000 Order")*, the EEL will be connected to NewSouth's facilities in NewSouth's collocation space at the POP SWC. NewSouth may purchase BellSouth's

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14 *Id.*, ¶ 8.

15 Indeed, if the *Supplemental Order Clarification* did not apply to new EELs, there would be no need to carve out an exception for option 3 of the safe harbor rules.

16 Joint Comments at 2.

17 Section 5.2.2 of Attachment 3 of the MCI Interconnection Agreement.

access facilities between NewSouth's POP and NewSouth's collocation space at the POP SWC. (emphasis added)[18]

At no time during the negotiation of these agreements has any party raised this as a point of contention nor requested it as an arbitration issue.

D. The Audits Comply with Both the *Supplemental Order Clarification* and the Terms of the Relevant Interconnection Agreements

NuVox argues that BellSouth attempts to "undo its negotiated and state commission approved interconnection agreements."[19] This is an obvious attempt by NuVox to obfuscate the issue to try to gain support for its ill-fated Petition. BellSouth has always stated that the audits comply with both the Commission's rules and terms of the interconnection agreement. To the extent that a CLEC has a dispute with the audit results, it is free to pursue resolution through the terms of the interconnection agreement. If the interconnection agreement requires any action on BellSouth's part prior to converting non-compliant circuits to special access, BellSouth will take those actions. Such actions, however, are only necessary if required by the interconnection agreement. The *Supplemental Order Clarification* did not, and the Commission should not, establish such a requirement. Absent some language in the interconnection agreement, if a circuit was improperly certified, there is no reason to delay its conversion back to special access and ILECs' rights should not be further restricted, nor CLECs' inappropriate behavior rewarded, by requiring a complaint proceeding.

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[18] Section 4.2.2 of Attachment 2 of the NewSouth Interconnection Agreement.

[19] NuVox Reply at 9.

E. The Commission Cannot Stay the *Supplemental Order Clarification* nor Interfere with Agreements Entered Into Freely by the Parties and Approved by State Commissions

WorldCom and the Competitive Telecommunications Association (referred to jointly as "WorldCom") filed joint comments urging the Commission to far exceed the scope of the Petition and stay the *Supplemental Order Clarification* as it relates to EEL audits.[20] WorldCom claims that moving forward with the audits would be wasteful because various proceedings, at the Commission and court of appeals, are ongoing and may impact the safe harbor rules placed on combined network elements. WorldCom offers no legal analysis to support the stay; it simply argues that possible changes may render the audits unnecessary. WorldCom's request to suspend all EEL audits must fail on two grounds.

First, the requirements for a stay are well established.[21] Not only does WorldCom fail to present facts that would meet the tests for a stay, it fails to even acknowledge that a stay a what it legally seeks from the Commission. Nevertheless, if WorldCom had acknowledged its request for a stay, it is clear that it could not meet the standard.

Second, even if the facts were different and WorldCom could meet the test for a stay, the stay would only apply to the audits ordered in *Supplemental Order Clarification*. It would not affect audits agreed to by the parties in their interconnection agreements. As BellSouth stated in its Opposition, the *Supplemental Order Clarification* and the interconnection agreements each provide BellSouth an independent right to audit. Accordingly, if the Commission stayed the

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[20] *See* WorldCom Comments at 11 ("The Commission should suspend all EEL audits.").

[21] A stay is warranted if the movant can demonstrate that: (1) it is likely to prevail on the merits; (2) it will suffer irreparable harm, absent a stay; (3) other interested parties will not be harmed if the stay is granted; and (4) the public interest would favor a grant of the stay. *In the Matter of Motion of Ranger Cellular and Miller Communications, Inc. for a Stay of the Cellular Rural Service Areas Auction No. 45, Order*, DA 02-1135, ¶ 5 (rel. May 24, 2002). *See Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921 (D. C. Cir. 1958).

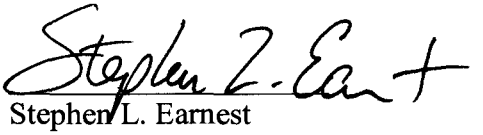
Supplemental Order Clarification, which it cannot do based on the record in this proceeding, BellSouth could still proceed with the audits pursuant to the language in the interconnection agreements.

II. Conclusion

BellSouth has shown the NuVox Petition should be denied. If the Commission, however, takes any action to diminish the ILECs' right to audit under the *Supplemental Order Clarification*, then the Commission must modify the CLECs' right to obtain EELs without demonstrating compliance with use limitations established by the Commission. Among such modifications, the Commission should mandate CLECs provide adequate documentation that all existing EELs comply with Commission requirements.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.

By: 

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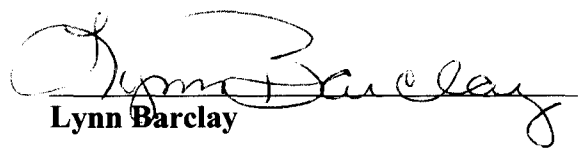
CERTIFICATE OF SERVICE

I do hereby certify that I have this 18th day of July 2002 served the parties of record to this action with a copy of the foregoing **BELLSOUTH'S REPLY COMMENTS** by Electronic Mail and U.S. Mail addressed to the parties listed on the attached service list.



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